IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. _____

THE CUNARD STEAM-SHIP COMPANY, LIMITED,
Petitioner,

v.

JOHN T. CLARK & SON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS E. DALY
Counsel for Petitioner
25 Broadway
New York 4, N. Y.

IN THE

Supreme Court of the United States

TERM, OCTOBER 1960

No.

PETER CALDAROLA,

Plaintiff,

v.

THE CUNARD STEAM-SHIP COMPANY, LIMITED,

Defendant and Third Party Plaintiff-Petitioner,

v.

JOHN T. CLARK & SON,

Third Party Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Cunard Steam-Ship Company, Limited prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 31, 1960, as reversed the judgment of the District Court in favor of it against the third party defendant-respondent.

Citation to Opinion Below

The opinion of the District Court (R. 161a-164a) is unreported and is printed in Appendix A hereto

annexed, *infra*, p. 1a. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto annexed, *infra*, p. 6a, is as yet unreported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 31, 1960, p. 12a, *infra*. Rehearing was denied on June 24, 1960, p. 14a, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1) (1958).

Questions Presented

I

Whether a stevedore's warranty to a shipowner established by this Court in *Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.* (350 U. S. 124) imposes on a stevedore only the obligation to exercise due care.

II

Whether a longshoreman's fault in failing to report or remove a grease spot on a ladder in the course of performing his duties is to be imputed to his employer-stevedore so as to obligate the stevedore to indemnify the shipowner from whom the longshoreman has had a recovery for injuries sustained when he stepped in that grease spot.

Statement

Plaintiff, Peter Caldarola, a longshoreman, was injured aboard the *S.S. Media*, a vessel owned and operated by Cunard, while engaged in stevedoring operations undertaken by his employer, John T. Clark & Son. Caldarola, while descending a ladder on defendant's ship, stepped into a spot of grease on the top rung,

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which he had observed for the first time three or four minutes before while ascending the ladder. His foot slipped. He fell to the deck and sustained a soft tissue injury in the back of his neck. Caldarola was engaged in duties which were within the scope of his employment when he climbed the ladder approximately five minutes before his injury. He made no effort to remove the grease, and did not inform the crew or his employer, Clark, of its presence.

Caldarola brought suit against Cunard in the District Court for the Eastern District of New York alleging negligence and unseaworthiness. The jurisdictional basis for the District Court was diversity of citizenship. Cunard then impleaded as third party defendant John T. Clark & Son, Caldarola's employer, claiming indemnity under the stevedoring contract between Cunard and Clark. The District Court, after dismissing plaintiff's negligence claim because no evidence was offered on that point, entered judgment on the jury's verdict that the vessel was unseaworthy, and denied Cunard's motion for a new trial upon the condition that plaintiff remit $2,000 of the original $8,500 jury verdict. The District Court, sitting without a jury, then found that Clark had breached its contract with Cunard to perform its stevedoring work in an efficient, safe and workmanlike manner, and awarded indemnity to Cunard in the amount of plaintiff's recovery.

The Circuit Court of Appeals affirmed the judgment in favor of the plaintiff holding, in effect, that the *S.S. Media* was not reasonably fit for her intended service by reason of the grease on the ladder. The Court reversed the District Court's determination that

Clark had breached its contract with Cunard to perform its duty in a safe and workmanlike manner. The Circuit Court said that there was no evidence that Clark or any of its employees knew of the grease on the ladder until the plaintiff put his hand on it shortly prior to the accident; therefore, the Court reasoned that the plaintiff's knowledge acquired such a short time before he slipped was insufficient to put Clark on notice of the condition and thus Clark had no opportunity to remove the grease or to have the ship's crew do so before the accident. The Court then found that the evidence tended to show that the grease could have been on the ladder for only a short time prior to the accident and thus it would be unreasonable to require Clark to have discovered it in the course of normal routine. Having concluded that Clark did not have any notice, actual or constructive, of the grease, and that there was no evidence that Clark had created the dangerous condition, the Court held that Clark need not indemnify Cunard.

Cunard's petition for rehearing, brought promptly after the Court's decision, was denied on June 24, 1960.

Reasons for Granting the Writ

It is respectfully submitted that this petition should be granted because (1) the decision below, in equating the stevedore's warranty with the duty to use due care, is in conflict with the decision of this Court in the *Ryan* case on a point of great practical significance: the scope of a stevedore's duty to indemnify a shipowner for damage paid by the latter to the stevedore's employees; and (2) the decision below, in failing to impute the fault of the stevedore's employee in the course of his

employment to the stevedore, is both erroneous and at variance with the decision of the Court of Appeals for the Fourth Circuit in *Calmar S. S. Corp.* v. *Naviroma Operating Co., Inc.*

I

The stevedore's warranty should not be limited to impose only a duty to exercise due care. It should be construed to impose an obligation that the stevedoring service shall be performed in a reasonably safe manner.

The Court of Appeals in this case construed the stevedore's warranty evolved in *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 350 U. S. 124 (1956) to impose nothing more than an obligation on the part of the stevedore to exercise due care. This is clear from the fact that the Court of Appeals denied the shipowner indemnity from the stevedore because the latter was found to have insufficient time to receive notice of the dangerous condition. It is submitted that this petition for certiorari should be granted because the Court of Appeals decision is in conflict with the decision of this Court in the *Ryan* case and because of the importance of defining the exact scope of the stevedore's warranty evolved for the first time in *Ryan*.

(1)

The stevedore's warranty formulated in *Ryan* was that the stevedoring work shall be performed in a reasonably safe manner. This Court analogized the stevedore's warranty to the warranty of a manufacturer with respect to the quality of his goods. Specifically it was said "It is petitioner's [stevedore's] warranty of workmanlike service that is comparable to a manufacturer's warranty of soundness of its manufactured product." 350 U. S. 124, 134.

(2)

It is elementary that a manufacturer's implied warranty of quality imposes an obligation greater than merely to use due care, for the manufacturer's warranty requires that the goods be reasonably fit for the purpose intended. See *e.g., Gahimer* v. *Virginia-Carolina Chemical Corp.*, 241 F. 2d 836 (7th Cir. 1957); *Great Atlantic & Pacific Tea Co.* v. *Smith*, 75 F. Supp. 156 (W. D. Ark.), *aff'd*, 170 F. 2d 474 (8th Cir. 1948); 1 *Williston, Sales* § 235 (Rev. Ed. 1948); 2 *Harper & James, The Law of Torts* § 28.22 (1956).

(3)

Clark's warranty in the instant case must thus be construed to mean that the stevedoring work shall be performed in a reasonably safe manner. Clark's duty was, by the nature of the warranty, to perform its promise to make Cunard whole if the work was not done in a reasonably safe manner. *The Soerstad*, 257 Fed. 130 (S. D. N. Y. 1919), Learned Hand, D. J. It is clear in the instant case that the stevedoring work was not performed in a reasonably safe manner. To observe a dangerous condition in the course of one's employment and fail to remove or report it is obviously not performing the service in a reasonably safe manner.

(4)

As a consequence of this malperformance of the stevedoring service, liability was imposed on Cunard under its warranty of seaworthiness to the plaintiff-longshoreman. See *Mitchell* v. *Trawler Racer*, 362 U. S. 539 (1960). Clearly under these circumstances Cunard has been damaged by an unsafe performance of the stevedoring service, and consequently if the stevedore's warranty is to be analogized to that of a

manufacturer, as provided in the *Ryan* case, the stevedore should be obligated to indemnify the shipowner for its loss.

(5)

It is immaterial that the malperformance of the stevedoring service is not that of the stevedore, for it is the service sold to the shipowner, i.e. the quality of the performance that is warranted just as the manufacturer's warranty is the quality of the product. To attempt to distinguish between the stevedore's service rendered by the stevedore and the stevedoring service rendered by others, such as employees or even subcontractors, would, aside from introducing an unnecessary complication into the issue of the shipowner-stevedore's indemnity relationship, be to work a ridiculous result, for all the stevedore would have to do to vitiate his warranty would be to subcontract the stevedoring work.

(6)

To equate the stevedore's warranty to a duty to exercise due care is grossly inequitable to the shipowner. The shipowner contracts for the stevedore service and turns over the loading and discharging areas of the vessel to the stevedore. Although the stevedore and not the shipowner has control of those areas, the shipowner is held absolutely liable on the seaworthiness warranty to third parties injured in those areas by dangerous substances created or allowed to exist by persons over whom the shipowner has no control. Surely elemental fairness requires that, at least with respect to areas within its immediate control, the stevedoring service will measure up to what the shipowner has bargained for, i.e. that it will be performed in a reasonably safe manner.

II

If the stevedore's warranty imposes no more than a duty to exercise due care, the Court of Appeals erred in not allowing the indemnity claim, for the fault of the stevedore's employee which caused the loss should have been imputed to the stevedore.

Clearly, a master is liable for the negligent acts of his servant which injure a third party while the servant is acting within the scope of his employment. *Restatement, Second, Agency* § 283 (1958); 57 C. J. S. Master & Servant § 571; *Philadelphia & Reading Railroad Co.* v. *Derby*, 55 U. S. 467 (1852); *United States Lighterage Corp.* v. *Petterson Lighterage & Towing Corp.*, 142 F. 2d 197 (2nd Cir. 1944).

In the instant case, both the District Court and the Circuit Court found that the plaintiff was negligent and that at all pertinent times he was acting within the scope of his employment. Moreover, as a result of the Court of Appeals decision, it is Cunard which has sustained the loss as a result of the longshoreman's fault in the performance of his work. It is submitted that the Court of Appeals grievously erred in not imputing to the stevedore the fault of its employee and that certiorari should be granted to review this decision because it is in conflict with a decision of the Court of Appeals of the Fourth Circuit.

In *Calmar S. S. Corp.* v. *Naviroma Operating Co.*, 266 F. 2d 79 (4th Cir. 1956), the Fourth Circuit allowed a shipowner to recover against a stevedoring company to the extent of an injured stevedore's judgment where the plaintiff was injured by another stevedore's negligent use of an unseaworthy lamp. The Court in *Cal-*

mar thus held that the stevedore's negligent use of the lamp and resulting injury to plaintiff and to the shipowner constituted a breach of the stevedoring company's contract that it would perform its duties with reasonable safety.

The damage caused to the shipowner in *Calmar*, *supra*, and the damage caused to Cunard in the instant case are identical; the shipowner was required to respond in damages to the injured stevedore. The *Calmar* case is in accordance with the basic principle that the fault of a servant committed in the course of his employment is imputed to his employer. And there need be no time lag between the servant's fault and the injury in order to fix liability on the employer, for in the *Calmar* case obviously the stevedore-employer had no notice of the longshoreman's misuse of the lamp which caused the injury.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted because (1) in holding that the stevedore's warranty imposes only a duty to exercise due care, the Court of Appeals decision is in conflict with the decision of this Court in the *Ryan* case and (2) in holding that the longshoreman's fault in the course of his employment should not be imputed to his stevedore-employer, the decision of the Court of Appeals is in conflict with the decision of the Fourth Circuit Court of Appeals in the *Calmar* case.

Respectfully submitted,

THOMAS F. DALY
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 17510

PETER CALDAROLA,

Plaintiff,

vs.

THE CUNARD STEAM-SHIP COMPANY, LIMITED,

Defendant and Third-party Plaintiff,

vs.

JOHN T. CLARK & SON,

Third-party Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a civil action in which the plaintiff asserted a claim for personal injuries against the defendant third-party plaintiff. The defendant third-party plaintiff thereupon asserted a claim against the third-party defendant predicated on an alleged breach of contract. The issues of fact raised by the complaint and the answer thereto were tried by the Court and a jury. The defendant third-party plaintiff and the third-party defendant waived their right to trial by jury, and the issues of fact raised by the third-party complaint and the answer thereto were tried by the Court.

I.

The plaintiff, Peter Caldarola, was an employee of the third-party defendant, John T. Clark & Son, and on August 17, 1956, was at work aboard the vessel S. S. MEDIA, owned by the defendant and third-party plaintiff, Cunard Steam-Ship Company, Limited. While in the performance of his work as a longshoreman the plaintiff slipped and fell from a ladder and was injured. The present action followed.

II.

The issues of fact raised by the complaint and the answer thereto were tried by the Court and a jury on June 3, 4 and 5, 1959. These issues were submitted to the jury for determination on June 5, 1959, and after due deliberation a verdict in favor of the plaintiff and against the defendant third-party plaintiff in the amount of $8500.00 was returned. A judgment was thereupon entered. A motion addressed to the verdict and judgment was heard by the Court on June 19, 1959. It was determined by the Court that the damages were excessive, and the verdict was reduced to $6500.00, conditioned, however, upon its acceptance by the plaintiff. An appropriate order was thereupon entered and the judgment was amended.

III.

The third-party defendant was an independent contractor engaged by the defendant third-party plaintiff under written agreement to perform the usual stevedoring work aboard the said vessel. The employees of the third-party defendant, including the plaintiff, were engaged in the performance of this work on August 17, 1956, when the accident occurred.

IV.

The third-party defendant was required by the express terms of the written agreement, Paragraph 2(a), to "Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor drivers, dock crane operators, foremen and such other stevedoring supervision as may be required for the proper and efficient discharging of cargo from or the loading of cargo into vessel's holds, tween decks, on deck, shelter or bridge spaces, deep tanks, cargo lockers and lazarettes, temporary bunker spaces but not fore and aft peaks and bilges." The written agreement was in the usual form, and under it the third party defendant was required to perform the work in an efficient, safe and workmanlike manner. It is here asserted by the defendant third-party plaintiff that this condition of the contract was breached.

V.

While the plaintiff was engaged in the performance of his work aboard the vessel, he admittedly observed a spot of grease on the top rung of an iron ladder which was against a housing in the vicinity of No. 6 hatch. This condition was observed by the plaintiff as he ascended the ladder, if not prior thereto, but he did not remove the grease and continued to use the ladder notwithstanding its condition. While the plaintiff was descending the ladder he stepped on the top rung, slipped and fell. The accident was the proximate cause of the injuries for which he claimed compensation in this action. It should be noted that there is testimony that the grease was not observed on the day prior to the accident.

VI.

The area in which the accident occurred was temporarily under the control and supervision of the servants and employees of the third-party defendant, and their failure to maintain the ladder in a reasonably safe condition rendered the vessel unseaworthy within the meaning of the law. The failure to maintain the ladder in a reasonably safe condition was a breach of the implied agreement to perform the work in an efficient and workmanlike manner. It was apparently determined by the jury that the condition of the ladder was the proximate cause of the accident which resulted in the plaintiff's injury.

CONCLUSIONS OF LAW

I.

The failure of the servants and employees of the third-party defendant to maintain the area in which they were engaged in the performance of their work in a reasonably safe condition rendered the vessel unseaworthy. The failure to maintain the area in a reasonably safe condition was a breach by the third-party defendant of its implied agreement to perform the work in an efficient, safe and workmanlike manner.

II.

The third-party defendant is for the reasons herein stated answerable in damages to the defendant third-party plaintiff in the amount of $6500.00, the amount awarded to the plaintiff for the injuries sustained.

ORDER FOR JUDGMENT

IT IS ORDERED, on this 20th day of July, 1959, that a judgment in the amount of $6500.00 be entered in favor of the defendant third-party plaintiff, The Cunard Steam-Ship Company, Limited, and against the third-party defendant, John T. Clark & Son; and,

IT IS FURTHER ORDERED that the Clerk of the Court enter judgment accordingly.

WILLIAM F. SMITH,
Judge, United States District Court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 255—October Term, 1959.

(Argued April 1, 1960 Decided May 31, 1960.)

Docket No. 25960

PETER CALDAROLA,

Plaintiff-Appellee,

v.

THE CUNARD STEAM-SHIP COMPANY, LIMITED,

Defendant-Appellant and Third-Party Plaintiff-Appellee,

v.

JOHN T. CLARK & SON,

Third-Party Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

BARNES, *Circuit Judge,** and SMITH, *District Judge.**

Appeal from two judgments of the United States District Court for the Eastern District of New York, William F. Smith, *J.*, the first entered upon a jury verdict holding the defendant steamship company liable for injuries suffered by plaintiff while working

* Sitting by designation.

as a longshoreman on defendant's vessel, and the second entered upon a decision of the court sitting without a jury holding the third party defendant stevedoring company liable to defendant upon a contract of indemnity.

Judgment for plaintiff affirmed. Judgment for defendant against third party defendant reversed.

BENJAMIN J. SERGI, New York, N. Y. (DiCostanzo & Klonsky, New York, N. Y. on the brief), *for plaintiff-appellee.*

JOHN W. CASTLES 3d, New York, N. Y. (John F. O'Connell and Lord, Day & Lord, New York, N. Y., on the brief), *for defendant-appellant.*

WILLIAM F. MCNULTY, New York, N. Y. (Hampton & Dietel, New York, N. Y., on the brief), *for third-party defendant-appellant.*

LUMBARD, *Chief Judge*:

These are appeals from two judgments of the district court, the first entered upon a jury verdict holding Cunard Steam-Ship Company liable to Peter Caldarola for injuries suffered by Caldarola while working as a longshoreman on Cunard's ship, the S.S. Media, and the second entered upon findings made by the court without a jury holding John T. Clark & Son, the stevedoring firm that employed Caldarola, liable to indemnify Cunard under the stevedoring contract between Clark and Cunard.

On August 17, 1956, Caldarola was working as a winch operator at the No. 6 hatch of the Media, which

was docked at Pier 92, North River, in New York City. Upon completion of loading at the hatch, plaintiff mounted a metal ladder running up the side of the deckhouse in order to return a wooden plank which he used as a seat while operating the winch to the roof of the deckhouse and in order to cut the ropes holding the canvas covering used to protect the winch operator from sun and rain. Although with his hand he had felt some grease on the top rung of the ladder as he went up it, Caldarola began his descent a moment or two later by placing his foot on the same rung. Because of the grease his foot slipped and he fell to the deck, injuring his back and neck. His suit against Cunard alleged that the vessel was unseaworthy by reason of the presence of the grease and that the ship's crew was negligent in failing to discover and remove it. The court dismissed the negligence claim because no evidence was submitted on this point, but upon the unseaworthiness claim the jury brought in a verdict for plaintiff of $8,500. Defendant's motion for a new trial was denied, upon the condition that plaintiff remit $2,000 of his recovery, to which condition plaintiff agreed. The claim of Cunard over against Clark was decided by the court, both parties having waived a jury. The court found that Clark had breached its contract with Cunard to perform the stevedoring work in an efficient, safe and workmanlike manner, and awarded indemnity to Cunard in the same amount as plaintiff's recovery. We affirm the judgment for plaintiff, but reverse that in favor of Cunard.

The only grounds urged for reversal of the judgment in favor of plaintiff are (1) that a transitory condition, such as the presence of grease on the rungs of a ladder, does not render a ship unseaworthy, and (2)

that no duty to maintain the ladder in a seaworthy condition extended to the plaintiff, since this was not a part of the ship to which he was entitled, or could reasonably have been expected, to go in the performance of his duties.

The view that a temporary condition, arising subsequent to the commencement of a voyage, may not constitute an unseaworthy condition was recently rejected by the Supreme Court in *Mitchell* v. *Trawler Racer, Inc.*, 28 U. S. L. Week 4293 (U. S. May 16, 1960). The Court held that the duty to maintain a seaworthy ship is no less exacting when the unseaworthy condition is only a transitory one than it is when the defect inheres in the ship's hull or machinery. "The liability for a temporary unseaworthy condition is [no] different from the liability that attaches when the condition is permanent." 28 U. S. L. Week at 4296.

With reference to the second claim of error, we stated in *Lauricella* v. *United States*, 185 F. 2d 327, 328 (2d Cir. 1950), that a shipowner's duty to provide stevedores with a reasonably safe place to work is "confined to those parts of the ship to which the [stevedore] * * * may reasonably be expected to go. His status as a business visitor is lost if he goes elsewhere * * *". However, it is plain that the ladder from which plaintiff fell in this case was part of his place of work. The testimony showed that plaintiff, who worked on the Media each time it came into New York, had long been accustomed to storing his seat atop the deckhouse, and that it was necessary to climb to the roof of the deckhouse to release the rope securing the tent which protected the winch operator. Although perhaps neither the comfort of a seat nor protection against the elements were absolutely necessary for the performance

of plaintiff's job, both were customary and both benefited the shipowner by making more tolerable and pleasant plaintiff's working conditions. It was entirely reasonable to anticipate that plaintiff would make use of the ladder to reach the roof of the deckhouse. Moreover, he did not leave the confines of his place of work to do so.

Clark's appeal from the decision that it breached its contractual duty to perform its services in a safe and workmanlike manner challenges the sufficiency of the evidence to support this finding. The contract between Clark and Cunard stated that the former would "provide all necessary stevedoring labor, including winchmen, * * * foremen and such other stevedoring supervision as may be required for the proper and efficient discharging of cargo from or the loading of cargo into vessel's holds. * * *" Under this agreement Clark was not required to act as an insurer against any loss by Cunard or to discover and correct every hidden danger. Its duty was only to perform its services with "reasonable safety." *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956).

There was no evidence in the case before us that the stevedore or any of its employees knew of the grease on the ladder until plaintiff placed his hand in it as he climbed to the roof of the deckhouse a few moments prior to the accident. This knowledge acquired by the plaintiff so short a time before he slipped was insufficient to put the stevedore on notice of the condition and give it an opportunity to remove the grease or to have the ship's crew do so before the accident. Cf. *Santo-*

marco v. *United States*, 2d Cir., April 5, 1960, slipsheet p. 1277. Furthermore, the evidence tended to show that the grease could have been present on the ladder for only a short time before the accident, and thus it would be unreasonable to require the stevedore to have discovered the grease in the course of normal routine.

Absent knowledge or constructive notice of the presence of the grease, the stevedore could only have breached its contractual duty if the conduct of its employees created the dangerous condition. Upon this question, there was testimony by one of plaintiff's fellow employees that a "fall" or wire cable, which hung down from an unused boom that had been swung out of the way by the stevedores, was touching the ladder. However, one of the Media's officers gave evidence that this wire had not been greased for some time, since such cables were only greased when the ship was at sea. And plaintiff himself testified that the grease on the cable was dried and brittle, while the grease into which he placed his hand and upon which he slipped was light and fluid. Thus, there was no evidence whatever that the grease which caused the accident came from the cable which the longshoremen had permitted to rest against the ladder.

The trial court's determination that Clark breached its contract to perform its duty in a safe and workmanlike manner was without foundation in the evidence and must be reversed.

Judgment for the plaintiff affirmed. Judgment for the defendant against the third-party defendant reversed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of May one thousand nine hundred and sixty.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STANLEY N. BARNES,
Circuit Judge,

HON. J. JOSEPH SMITH,
District Judge.

PETER CALDAROLA,
Plaintiff-Appellee,

v.

THE CUNARD STEAM-SHIP COMPANY, LIMITED,
Defendant and Third Party Plaintiff-Appellant,

v.

JOHN T. CLARK & SON,
Third Party Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED that the judgment for the plaintiff-appellee of said District Court be and it hereby is affirmed.

FURTHER ORDERED, ADJUDGED AND DECREED that the judgment of the said District Court for the defendant-appellant against the third party defendant-appellant be and it hereby is reversed in accordance with the opinion of this Court, with costs to the third party defendant-appellant.

/s/ A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETER CALDAROLA,
Plaintiff-Appellee,

v.

THE CUNARD STEAM-SHIP COMPANY, LIMITED,
Defendant-Appellant and
Third-Party Plaintiff-Appellee,

v.

JOHN T. CLARK & SON,
Third Party Defendant-Appellant.

On Petition for Rehearing

LORD, DAY & LORD, New York, N. Y.
for third party plaintiff-appellee.

Petition denied.

J. E. L.
U. S. C. J.

S. N. B.
U. S. C. J.

J. J. S.
U. S. D. J.

June 24, 1960

APPENDIX B

CALMAR STEAMSHIP CORPORATION, a Delaware corporation, Defendant and Third Party Plaintiff, Appellant,

v.

NAGIREMA OPERATING COMPANY, INC., a body corporate, Third-Party Defendant, Appellee.

No. 7804.

United States Court of Appeals
Fourth Circuit.

Argued March 13, 1959.

Decided April 8, 1959.

* * * * *

SOBELOFF, Chief Judge.

This is an appeal from the District Court's judgment denying a shipowner indemnity from a stevedoring contractor for the amount recovered from the shipowner by an injured longshoreman-employee of the stevedore.

The longshoreman, Joseph Oleszczuk, was struck and injured by a cargo light which came loose from its cable when thrown into number 4 hold of the S. S. Portmar by a deckman who was also an employee of the stevedore. Oleszczuk brought suit against the Calmar Steamship Corporation, owner and operator of the ship, charging that his injury was due to the unseaworthiness of the vessel and the negligence of her owner. Calmar impleaded Nagirema Operating Co. Inc., the stevedore, as a third-party defendant, claiming indemnity for any amount which it might be obligated to pay Oleszczuk.

The evidence shows that the light which struck the plaintiff had a single bulb screwed into a large bell-shaped metal reflector, to which was joined a metal handle. A cable of electric wires passed through a small circular opening at the top of the reflector and the wires were supposed to be securely attached to terminal screws. It is customary, as an extra precaution, for the ship's crew to tape or tie the cable to the handle on the reflector in order to relieve the strain on the terminal screws. When so arranged, the lights are said to be "seized."

In accordance with the contract between the owner and the stevedore, the ship supplied the cargo lights. The one supplied for hold number 4, in which the plaintiff was working, had not been seized. The stevedore's deckman not only accepted and used the unseized light, but threw it over the side of the hold so roughly that the light was jerked from the cable and fell into the hold, injuring the plaintiff.

In response to written interrogatories, the jury found that the ship's crew had been negligent in regard to the light, and that the light constituted an unseaworthy appliance. Both the negligence and the unseaworthiness were found to be proximate causes of the accident. The stevedore was also found to be negligent, both in having used an unseized light and in having lowered it in an unsafe manner. The latter was declared by the jury to be also a proximate cause of the accident.

A judgment for $35,000 was entered in favor of Oleszczuk against Calmar, and this recovery is not in issue here. The sole remaining question, whether Calmar is entitled to indemnity from Nacirema, was sub-

mitted to the District Judge with the understanding that the jury's findings would control "as far as they go."

The court ruled first that any claim which Calmar might have against Nacirema must be based upon the contractual relationship between them. Citing Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 1956, 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133, and Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 1958, 355 U. S. 563, 78 S. Ct. 438, 441, 2 L. Ed. 2d 491, the court said that a service contract such as the one here involved implies a promise by the expert stevedore to perform "with reasonable safety" and that this obligation relates not only to the handling of cargo, as in Ryan, but to the use of equipment incidental thereto, as in Weyerhaeuser. The District Court then held that the manner in which Nacirema had used the cargo light constituted a breach of this contractual duty.

Next, the court considered the limitation on the shipowner's right of indemnity, expressed by the Supreme Court in Weyerhaeuser in the words, "absent conduct on its part sufficient to preclude recovery." While it was pointed out that the Supreme Court had not yet specified what conduct on the part of the shipowner would be sufficient to preclude recovery, the District Court reasoned that, to bar recovery, the shipowner's conduct would have to amount to a breach of a contractual duty owed by it to the stevedore. The court then decided that while the contract involved here provided simply that Calmar would supply lights for night work, it was obligated to supply lights which were reasonably safe, and that those supplied failed to satisfy this obligation. In these circumstances, the court

concluded that having breached the contract, Calmar's conduct was "sufficient to preclude recovery" of indemnity.

Since this decision by the District Court, however, the Supreme Court has adjudicated Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 448, 3 L. Ed. 2d 413. While this also does not undertake a definitive statement of the conduct on the part of the shipowner which will bar indemnity, it indicates that furnishing defective equipment will not necessarily have that effect.

There, the ship supplied loading and unloading gear which included a safety cut-off device for the winch, set by the ship's crew at twice the rated limit of the rigging. This was said by the Supreme Court to be no different in principle from loading and unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved. The winch was found to make the vessel *pro tanto* unseaworthy. The Supreme Court said:

> "For there is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel."

Nevertheless, the ship was allowed to recover over for the stevedore's negligence which was found to be a breach of its warranty of workmanlike service.

Dissenting, Justice Harlan declared that on the court's premises, that the stevedore merely brought into play an unseaworthy condition created by the vessel itself and that such unseaworthiness was the cause of Crumady's injuries, he did not think the de-

mitted to the District Judge with the understanding that the jury's findings would control "as far as they go."

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 379

THE CUNARD STEAM-SHIP COMPANY, LIMITED,
Petitioner,
vs.
JOHN T. CLARK & SON, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Statement	1
Nature of Action	1
Decisions Below	3
The Issue	5
First Point—There is no conflict between the decision of the Court of Appeals herein and the decision of this Court in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956), or the decision of the Court of Appeals for the Fourth Circuit in *Calmar S.S. Corp. v. Nacirema Operating Co.*, 266 F. 2d 79 (1959)	6
Conclusion—The petition for a writ of certiorari herein should be denied	8

Cases Cited

Calmar S.S. Corp. v. Nacirema Operating Corp., 266 F. 2d 79 (4th Cir., 1959) 5, 6, 7, 8

Cromady v. The Joachim Hendrik Fisser, 358 U. S. 423 (1958) 7, 8

Kahn v. City of New York, 274 N. Y. 118, 133-134 (1937) 10

MacPherson v. Buick Motor Co., 217 N. Y. 382 (1916) 9

Reddick v. McAllister Lighterage Line, Inc., 258 F. 2d 297 (2nd Cir., 1958), cert. denied 358 U. S. 908 (1958) 10

Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp., 350 U. S. 124 (1956) 4, 6, 7, 8

Schilling v. Delaware & H. R. Corp., 114 F. 2d 69, 71 (2nd Cir., 1940) 10

Weyerhaeuser v. Nacirema Operating Co., Inc., 355 U. S. 563 (1958) 4, 7

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

This brief is being submitted by the respondent John T. Clark & Son, Inc. (hereinafter designated "Clark"), in opposition to the petition of The Cunard Steam-Ship Company, Limited (hereinafter designated "Cunard"), the petitioner herein, for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Nature of Action

The action giving rise to the present proceeding was a maritime tort action commenced by one Peter Caldarola, a longshoreman employed by Clark, against Cunard, in the United States District Court, Eastern District of New

York, to recover damages for personal injuries allegedly sustained by said plaintiff on August 17, 1956, while he was engaged in the performance of his duties as a longshoreman aboard the S.S. *Media*, a vessel owned and operated by Cunard, in the Port of New York. Clark was the stevedoring contractor in charge of said operations (Petitioner's Appendix A, pp. 1a-2a).

Caldarola claimed that, while he was descending an iron ladder affixed to the deckhouse near the No. 6 hatch of the vessel, his foot slipped on some grease on the top rung of the ladder, causing him to fall to the deck below and to sustain the injuries of which he complained (Petitioner's Appendix A, p. 3a). Although he claimed that he had previously observed the grease on the rung of the ladder when he ascended same only a few minutes before the accident occurred, there was no proof as to how the grease got on the ladder or how long it had been there. Furthermore, there was no proof that either Cunard, the owner of the vessel, or Clark, the stevedoring contractor, were aware of its presence (Petitioner's Appendix A, pp. 10a-11a).

The complaint of Caldarola in his action against Cunard sought a recovery on the theory of negligence, as well as on the theory of unseaworthiness. The District Court, however, dismissed the negligence count on the ground that no proof of negligence on the part of Cunard was adduced at the trial, and submitted the main action to the jury solely on the theory of unseaworthiness (Petitioner's Appendix A, p. 3a).

In addition to denying the material allegations of Caldarola's complaint, Cunard served a third-party complaint on Clark, seeking judgment over against said stevedoring contractor on the theory of breach of implied warranty to perform the stevedoring operations in a reasonably safe and workmanlike manner (Petitioner's Appendix A, p. 3a).

Only the issues in the main action by Caldarola against Cunard were submitted to the jury, it having been duly stipulated by counsel that the issues raised by the third-party complaint of Cunard against Clark be reserved for decision by the District Court (Petitioner's Appendix A, p. 1a).

Decisions Below

Following a jury verdict in favor of Caldarola in the main action (based solely on the theory of unseaworthiness), judgment in the sum of $6,500.00 was entered in favor of said plaintiff and against Cunard. Based on the District Court's finding that "The failure to maintain the area (*i.e.*, the rung of the ladder) in a reasonably safe condition was a breach by the third-party defendant of its implied agreement to perform the work in an efficient, safe and workmanlike manner", judgment over in said amount was entered in favor of Cunard and against Clark under the third-party complaint (Petitioner's Appendix A, pp. 4a-5a).

In an opinion reported at 279 F. 2d 475—which will be found at pages 6a-11a of Petitioner's Appendix A—the Court of Appeals for the Second Circuit unanimously affirmed the judgment in favor of Caldarola and against Cunard, but reversed the judgment over in favor of Cunard and against Clark entered on the third-party complaint.

In reversing the judgment over in favor of Cunard and against Clark, the Court of Appeals, *per* Lumbard, C. J., held (Petitioner's Appendix A, pp. 10a-11a):

> "Clark's appeal from the decision that it breached its contractual duty to perform its services in a safe and workmanlike manner challenges the sufficiency of the evidence to support this finding. The contract between Clark and Cunard stated that the former would 'provide all necessary stevedoring labor, in

cluding winchmen, * * * foremen and such other supervision as may be required for the proper and efficient discharging of the cargo or the loading of cargo into vessel's holds. * * *' Under this agreement Clark was not required to act as an insurer against any loss by Cunard or to discover and correct every hidden danger. Its duty was to perform its services with 'reasonable safety.' *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956).

There was no evidence in the case before us that the stevedore or any of its employees knew of the grease on the ladder until plaintiff placed his hand in it as he climbed to the roof of the deckhouse a few minutes prior to the accident. This knowledge acquired by the plaintiff so short a time before he slipped was insufficient to put the stevedore on notice of the condition and give it an opportunity to remove the grease or to have the ship's crew do so before the accident. Cf. *Santomarco* v. *United States*, 2d Cir., April 5, 1960, slipsheet p. 1277. Furthermore, the evidence tended to show that the grease could have been present on the ladder for only a short time before the accident, and thus it would be unreasonable to require the stevedore to have discovered the grease in the course of the normal routine.

Absent knowledge or constructive notice of the presence of the grease, the stevedore could only have breached its contractual duty if the conduct of its employees created the dangerous condition. Upon this question, there was testimony by one of the plaintiff's fellow employees that a 'fall' or wire cable, which hung down from an unused boom that had been swung out of the way by the stevedores, was touching the ladder. However, one of the Media's officers gave evidence that this wire had not been greased

for some time, since such cables were only greased when the ship was at sea. And the plaintiff himself testified that the grease on the cable was dried and brittle, while the grease into which he placed his hand and upon which he slipped was light and fluid. Thus, there was no evidence whatever that the grease which caused the accident came from the cable which the longshoremen had permitted to rest against the ladder.

The trial court's determination that Clark breached its contract to perform its duty in a safe and workmanlike manner was without foundation in the evidence and must be reversed."

Cunard thereafter filed a petition for a rehearing as respects the determination thus made, but its petition was denied by the Court of Appeals (Petitioner's Appendix A, p. 14a).

The Issue

In support of its petition for a writ of certiorari herein, Cunard contends that the decision of the Court of Appeals, "in equating the steyedore's warranty with the duty to use due care, is in conflict with the decision of this Court in the *Ryan* case on a point of great practical significance", and that the decision of the Court of Appeals is "both erroneous and at variance with the decision of the Court of Appeals for the Fourth Circuit in *Calman S.S. Corp. v. Nacirema Operating Co., Inc.*" 266 F. 2d 79 (Petition, pp. 4-5).

FIRST POINT

There is no conflict between the decision of the Court of Appeals herein and the decision of this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956), or the decision of the Court of Appeals for the Fourth Circuit in *Calmar S.S. Corp.* v. *Nacirema Operating Co.*, 266 F. 2d 79 (1959).

Ryan Stevedoring Co., Inc. v. *Pan-Atlantic S.S. Corp.*, *supra*, and *Calmar S.S. Corp.* v. *Nacirema Operating Corp.*, *supra*, are plainly distinguishable from the case at bar on their facts.

In the *Ryan* case the evidence established, and the Circuit Court of Appeals for the Second Circuit expressly found, that Ryan, the stevedoring contractor, "*created* the hazardous condition", which caused the injury to the longshoreman "by its improper stowage of the pulp paper rolls at Georgetown" (*Palazzolo* v. *Pan-Atlantic S.S. Corp.*, 211 F. 2d 277, 279—Italics ours). Consequently, the only question before this Court was, as Mr. Justice Burton stated in the very first paragraph of the majority opinion, "whether liability exists where a contractor, without entering into an express agreement of indemnity, contracts to perform a shipowner's stevedoring operations and the longshoreman's injuries are caused by the contractor's unsafe stowage of the ship's cargo." In answering this question in the affirmative, the Court stated at page 133 of its opinion that the stevedoring contractor's agreement to perform the stevedoring operations "necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely" and that, as a consequence, "Competency and safety of stowage are inescapable elements of the service undertaken." Finally, in concluding its opinion, the Court stated that "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured

longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense" (pp. 134-135).

In the *Calmar* case the Court of Appeals for the Fourth Circuit likewise expressly found that the accident resulting in the longshoreman's injury was caused, in part at least, by the fault of the stevedoring contractor. At page 80 of its opinion the Court of Appeals took pains to point out that the deckman of the stevedoring contractor "not only accepted and used the unseized light" supplied by the vessel for the work being performed in the No. 4 hold of the *S.S. Portmar*, but that he thereafter "threw it over the side of the hold so roughly that the light was jerked from the cable" to which it was attached and then "fell into the hold, injuring the plaintiff."

In the case at bar there is no proof from which it can be inferred that Clark was in any way responsible for the presence of the "light and fluid" grease on the top rung of the iron ladder affixed to the deckhouse alongside the No. 6 hatch, which caused the accident resulting in the injury to Caldarola, and the Court of Appeals in the Second Circuit expressly so found (Petitioner's Appendix A, p. 11a). As far as the proof adduced at the trial is concerned, this grease may well have come from the shoe of one of the members of the *S.S. Media's* own crew who were using the ladder while the stevedoring operations were in progress.

The case at bar is also distinguishable, on this same basic ground, from *Weyerhaeuser* v. *Xacirema Operating Co., Inc.*, 355 U. S. 563 (1958), and *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1958), two of the more recent cases wherein this Court has applied the doctrine of the *Ryan* case. In the *Weyerhaeuser* case the loose board which fell from the temporary winch shelter

and struck the longshoreman had previously been erected by the stevedoring contractor, while in the *Crumady* case the stevedoring contractor was found to have been negligent in creating a load on the topping-lift "greatly in excess of its safe working load", thus causing the boom to fall and strike the longshoreman. This Court accordingly held that "since the *negligence* of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over" (p. 429—Italics ours).

In an endeavor to support its claim that there is a conflict between the *Ryan* and *Calmar* decisions and the decision of the Court of Appeals for the Second Circuit herein, the petitioner completely ignores the basic factual distinction between those cases and the case at bar. Instead, it lays great stress on the observation of this Court in the *Ryan* case that the implied warranty of a stevedoring contractor to perform his services in a reasonably safe and workmanlike manner is "comparable to a manufacturer's warranty of the soundness of its manufactured product". (*Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 133-134). Solely on the basis of this observation, the petitioner argues that negligence or fault plays no part whatever in determining the liability of a stevedoring contractor for a breach of his implied warranty to perform his services in a reasonably safe and workmanlike manner. It is submitted that this conclusion finds no support in any of the reported cases.

Although there may be a general analogy between the warranty of a manufacturer with respect to the soundness of its manufactured product and the implied warranty of a stevedore to perform his services in a reasonably safe and workmanlike manner, there is a basic point of difference between the two warranties. Wherever a right of recovery exists against the manufacturer of a manufac-

tured product, in the absence of a showing of negligence or fault, such right arises solely by virtue of an express warranty created by statute (see *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382). In such a case the scope of the warranty is measured by the terms of the statute which creates it. The implied warranty of a stevedoring contractor to perform his services in a reasonably safe and workmanlike manner, on the other hand, is merely an incident of his contract of employment. The scope of the implied warranty must therefore be measured solely by the obligation imposed by the contract of employment itself. We know of no case which holds or suggests that a stevedoring contractor is required to do more than to exercise reasonable care in the performance of his work. This being so, it is submitted that it necessarily follows that the stevedoring contractor is liable only for a loss which proximately results from his failure to exercise such care—which, of course, means that it must be established that the loss was proximately caused by some negligence or fault on his part in the performance of his work.

As the Court of Appeals for the Second Circuit took great pains to point out in its opinion herein, the contract between Clark and Cunard did not make Clark "an insurer against any loss by Cunard", nor did it impose upon Clark the onerous duty "to discover and correct every hidden danger" aboard the *S.S. Media* arising from a condition not created by Clark or its own employees. On the contrary, it merely imposed upon Clark the duty to perform the stevedoring services covered thereby in a reasonably safe and efficient manner, or with "reasonable safety" (Petitioner's Appendix A, p. 10). There is no proof, as the Court expressly found, that Clark breached this duty in any way.

As the Court of Appeals further pointed out, "Absent knowledge or constructive notice of the presence of the grease, the stevedore could only have breached its contractual duty if the conduct of its employees created the

dangerous condition" (Petitioner's Appendix A, p. 11a). Granted, as argued by Cunard on page 8 of its petition herein, that "a master is liable for the negligent acts of his servant which injure a third party while the servant is acting within the scope of his employment", it does not follow from this that the observation of Caldarola that there was grease on the top rung of the ladder when he ascended it only a few minutes before the accident occurred was sufficient to convey notice, actual or constructive, to Clark itself of the existence of this purely temporary or transient condition of unseaworthiness aboard the vessel. Caldarola was not the *alter ego* of Clark aboard the S.S. *Media*. Any knowledge which he may have acquired as to the presence of the grease on the top rung of the ladder when he ascended the same only a few minutes before the accident therefore may not be imputed to his employer (*Schilling* v. *Delaware & H. R. Corp.*, 114 F. 2d 69, 71 [2nd Cir., 1940]; *Kuhn* v. *City of New York*, 273 N. Y. 118, 133-134 [1937]).

In principle, the case at bar is very similar to *Reddick* v. *McAllister Lighterage Line, Inc.*, 258 F. 2d 297 (2nd Cir., 1957), wherein this Court denied the petition of the owner of the lighter there involved for a writ of certiorari (358 U. S. 908).

In the *Reddick* case the Court of Appeals for the Second Circuit likewise reversed a judgment over in favor of the owner and against the stevedoring contractor (the same stevedoring contractor involved herein) on the ground that there was no negligence or fault on his part proximately causing the injury sustained by the longshoreman. If anything, the *Reddick* case was stronger than the case at bar because a majority of the Court were of the opinion that the stevedoring contractor had breached his contract to stow the cargo aboard the lighter in a reasonably safe and workmanlike manner. Even so, the Court reversed the judgment over in favor of the owner on the ground that the accident resulting in the longshoreman's injury

was not proximately caused by the negligent stowage of the cargo, but by a latent defect in a board on top of one of the crates stowed on the deck of the lighter, even though the negligent stowage of the cargo required the longshoreman to climb on top of the crate in order to place a sling around it.

CONCLUSION

The petition for a writ of certiorari herein should be denied.

Dated: New York, New York, September 19, 1960.

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